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17 UNITED STATES DISTRICT COURT
18 FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

19 NATIONAL URBAN LEAGUE et al.,

20 Plaintiffs,

21 v.

22 WILBUR L. ROSS, JR., et al.,

23 Defendants.

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CASE NO. 5:20-cv-05799-LHK

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR TEMPORARY
RESTRANDING ORDER**

Date: TBD

Time: TBD

Place: Courtroom 8

Judge: Hon. Lucy H. Koh

1 **I. INTRODUCTION**

2 Defendants' submissions and arguments to this Court against a TRO, and especially the
3 Fontenot Declaration submitted last night, have confirmed that a TRO now is necessary. Mr.
4 Fontenot makes clear that, among other things, September 11 is the date by which critical Census
5 field operations can be deemed "completed" regardless of actual completion percentages—a
6 looming issue for the vast majority of census regions, according to Mr. Fontenot—and that Census
7 field workers are being terminated now. A TRO is thus the only way to ensure the status quo
8 remains in effect until the September 17 PI Hearing. Absent a TRO, Plaintiffs and the public
9 interest will be irreparably harmed by Defendants' actions.

10 **II. THE CENSUS COUNT IS IN JEOPARDY AND THE THREAT OF
11 IRREPARABLE INJURY IS CLEAR**

12 At the August 26, 2020 CMC, Defendants could not provide this Court with even basic
13 information regarding the Bureau's wind-down operations. Under Court order to do so, on
14 September 2, Defendants provided a three-sentence non-explanation, including that "the Census
15 Bureau has already begun taking steps to conclude field operations" and would do so "throughout
16 September." Dkt. 63. Alarmed that operations were already being shut down, but without being
17 provided any detail, Plaintiffs felt compelled to file an immediate motion for TRO. And
18 Defendants' September 4 Opposition to Plaintiffs' TRO (Dkt. No. 74)—which again provided no
19 specifics, but just-trust-us assertions such as "Closeout for a particular area thus means that a census
20 count in that area is complete—not that the count is being foreshortened"—has only heightened this
21 concern. So, too, has Defendants' approach during the September 4, 2020 TRO Hearing, where the
22 Court was told field operations were not being shut down until reaching a 85-90% completion rate,
23 and that all would be made clear by Mr. Fontenot's forthcoming declaration.

24 Mr. Fontenot's declaration falls far short of that promise. Most critically, it does not state
25 that the Bureau is following the same closeout procedure that they would have followed had the
26 COVID-19 Plan remained in place. It does not provide details about what qualifies as "complete,"
27 or why San Diego already has a predetermined date for shutting down operations. Nor does it
28 answer many of the other questions this Court posed to Defendants. But Mr. Fontenot's declaration

1 does make one overarching point clear: that an immediate TRO is vital. As the Court may recall,
2 on July 8, Mr. Fontenot stated that the Bureau was “past the window of being able to get those
3 counts by those [December 31] dates.” *See* Dkt. 36 at 10:19-22. Through Mr. Fontenot, we now
4 have heard for the first time that for the Bureau’s nonresponse follow up (NRFU) operation, (1) as
5 of September 3, 2020 roughly only **11%** of CFS [Census Field Supervisor] areas nationwide were
6 eligible for the closeout phase, which happens when a CFS area crosses the 85% completion mark,
7 yet (2) ***all*** CFS areas will become eligible for closeout procedures on September 11, regardless of
8 completion rate, at which time each regional director can unilaterally decide to move the area into
9 closeout to meet the September 30 deadline. Dkt. 81-1, Fontenot Decl. ¶ 95. When Defendants
10 said that “closeout for a particular area thus means that a census count in that area is complete—
11 not that the count is being foreshortened,” Plaintiffs were right to worry, because as of September
12 11, for what may be a vast majority of CFU areas, “complete” means whatever a regional director
13 may decide, in light of the mandate to have all field operations cease by September 30. Deemed
14 “complete” precisely *because* the time, and therefore count, *has* been foreshortened.

15 Furthermore, what constitutes “complete” for a given household remains unexplained. The
16 internal Census Bureau document, only touched on by Mr. Fontenot enough to suggest it came
17 from him, *see* Fontenot Decl. ¶ 81, indicates that the Replan has increased reliance on
18 administrative records, and reductions in quality assurance operations during NRFU. *See* Dkt. 66-
19 3 at 23-24. But use of administrative records or proxies is less accurate than direct enumeration,
20 particularly so for immigrants and racial and ethnic minorities. *See* Dkt. 36-2, Thompson Decl. ¶¶
21 20-23; Dkt. 36-3, Hillygus Decl. ¶¶ 19-29. Defendants provide no explanation as to what degree
22 of accuracy has been sacrificed by the Replan, and Plaintiffs’ experts and the Bureau’s own
23 documents make clear that inaccuracies will hit immigrants and racial and ethnic minorities the
24 hardest.

25 Mr. Fontenot’s declaration also discusses a number of additional topics reaffirming
26 Plaintiffs’ allegations in the Complaint, and therefore likelihood of success on the merits, such as:

27

- 28 • the well-funded status of the Bureau (¶¶ 15-18);
 - the extended work that went into the original Census operational plan (¶¶ 9-71);

- the necessity of the extended COVID-19 Plan (¶¶ 77-80);
- the fact that the Bureau was operating under the COVID-19 Plan for many months (¶¶ 80-81);
- the critical importance of nonprofit organizations and other actors in assisting the Bureau with implementing its timeline and counts, including some of the Plaintiffs here by name (¶¶ 40-42);
- the sudden truncation of everything in late July 2020, when Mr. Fontenot was forced to prepare and present a “Replan” over a 4-day period (¶ 81); and
- the fact that the Replan does compromise the quality of the Census (albeit to an unidentified degree) (¶ 82).

Yet perhaps most importantly for the instant motion is Mr. Fontenot’s candid assessment regarding the importance and status of Census field workers:

Lack of field staff would be a barrier to reverting to the COVID Schedule were the Court to rule later in September. The Census Bureau begins terminating staff as operations wind down, even prior to closeout. Based on progress to date, as is standard in prior censuses, we have already begun terminating some of our temporary field staff in areas that have completed their work. It is difficult to bring back field staff once we have terminated their employment. Were the Court to enjoin us tomorrow we would be able to keep more staff on board than were the Court to enjoin us on September 29, at which point we will have terminated many more employees.

Fontenot Decl. ¶ 98. In other words, Mr. Fontenot is telling this Court that being enjoined now rather than later is necessary to keep Census field staff in place. This refreshingly candid statement is a welcome contrast to Defendants’ TRO Opposition, which argued that a TRO will force the Bureau “to replan a massive operation” and that having the Bureau “reshuffle its operations at this late juncture would indeed risk undermining the accuracy Plaintiffs allegedly seek to protect.” Dkt. 74 at 4. Mr. Fontenot also notes that “[i]f our schedule were extended, we would evaluate whether to reschedule” an important quality control operation they presumably removed because of the limited time remaining before September 30. *Id.* ¶ 99. In his words, “[w]e would go through each and every aspect of remaining operations and determine how best to use the remaining time to maximize the accuracy and completeness of the census results.” *Id.*

Thus, according to Mr. Fontenot, if the Court enjoins Defendants immediately, they will have more employees to continue NRFU operations and could comb through operations to maximize the accuracy of the census. Moreover, any burdens or costs seem absorbable into the Bureau’s ample budget, which “represents enough funding to successfully complete the 2020

1 Census in virtually all possible scenarios.” *Id.* ¶ 15. And to be clear, the relief Plaintiffs are
2 seeking is very limited. The Court would simply be ordering the Bureau not to take any actions
3 inconsistent with the very plan Mr. Fontenot and the experts at the Bureau had themselves adopted
4 and implemented for four months before the 4-day Replan—no more, no less—in the short time
5 before the PI hearing.

6 With the threat of irreparable injury established—and no countervailing interest against a
7 short TRO—Plaintiffs respectfully submit that maintaining the status quo is paramount.

8 **III. DEFENDANTS’ THRESHOLD ARGUMENTS REGARDING**
9 **JUSTICIABILITY AND STANDING FAIL**

10 Defendants’ TRO Opposition only briefly touches on various merits-related issues,
11 arguing that this case is essentially not justiciable, and referring the Court to Defendants’ PI
12 Opposition. Plaintiffs will address each of these arguments in detail in their upcoming Reply in
13 support of their PI Motion. But to the extent they factor into the Court’s views on the merits of
14 the TRO at issue here, Plaintiffs will address them briefly here.

15 *First*, Defendants argue that their decision to promulgate the Replan was compelled by
16 the statutory deadline. As Plaintiffs will explain more fully, it was not: The statutory deadline
17 must, as applied in these extraordinary circumstances, bow to the constitutional duty to conduct
18 an accurate census. More important than the deadline, “the [Census] Act imposes ‘a duty to
19 conduct a census that is accurate and that fairly accounts for the crucial representational rights
20 that depend on the census and the apportionment.’” *Dep’t of Com. v. New York*, 139 S. Ct. 2551,
21 2568-69 (2019) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 819-20 (1992)); *see also Utah*
22 *v. Evans*, 536 U.S. 452, 478 (2002) (Census Clause of the Constitution carries with it a “strong
23 constitutional interest in accuracy”). Moreover, even if Defendants were correct, that would not
24 free them from the duty to comply with the APA’s standards of reasoned decisionmaking. *See*
25 *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1908 (2020) (holding
26 that although DHS rested its decision to rescind DACA “on the conclusion that DACA is
27 unlawful,” the rescission must still be vacated under the APA for failure to consider all relevant
28 aspects of the problem).

1 *Second*, courts have repeatedly rejected the argument that census-related decisions are
2 beyond APA review. Indeed, in the citizenship question case, the Supreme Court stated that
3 “[t]he taking of the census is not one of those areas traditionally committed to agency discretion”
4 and is subject to judicial review under the APA. *Dep’t of Com. v. New York*, 139 S. Ct. 2551,
5 2568-69 (2019). Other courts have held similarly. *See, e.g.*, *Carey*, 637 F.2d at 838-39;
6 *California v. Ross*, 362 F. Supp. 3d 727, 743-46 (N.D. Cal. 2018); *Kravitz v. Dep’t of Com.*, 336
7 F. Supp. 3d 545, 567 & n.14 (D. Md. 2018) (citing cases). Defendants’ promulgation of the
8 Replan, like the decision to add a citizenship question, is final agency action. And the political
9 question doctrine has been rejected in previous census-related cases as well. *See, e.g.*, *New York*
10 *v. U.S. Dep’t of Com.*, 315 F. Supp. 3d 766, 790-91 (S.D.N.Y. 2018). As the *New York* court
11 explained,

12 courts, including the Supreme Court and the Second Circuit, have
13 entertained challenges to the conduct of the census for decades
14 and, more to the point, have consistently rejected application of the
15 political question doctrine in such cases. Those courts have
16 acknowledged that the text of the Constitution vests Congress with
virtually unlimited discretion in conducting the decennial actual
Enumeration. Yet, time and again, they have recognized that the
judiciary has at least some role to play in reviewing the conduct of
the political branches with respect to the decennial census.

17 *Id.* at 791 (internal citations to numerous cases and quotations omitted).

18 *Third*, the harms that Plaintiffs have alleged and described in their PI Motion have been
19 firmly upheld as conferring standing in a case like this. *See* Dkt. 36 at 28-33.

20 At bottom, it is telling that Defendants’ primary arguments here are based on threshold
21 issues and not the Bureau’s action itself.

22 **IV. CONCLUSION**

23 For the reasons set forth above, and in their motion for a temporary restraining order, in
24 the motion for a preliminary injunction and all supporting documents, and at hearing before the
25 Court, Plaintiffs request that the Court enter a TRO in accordance with Plaintiffs’ Proposed
26 Order, enjoining Defendants from implementing or allowing to be implemented any actions as a
27 result of the shortened timelines in the Bureau’s Replan, including but not limited to winding
28 down or altering any Census field operations.

1 Dated: September 5, 2020

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12 **ATTESTATION**

13 I, Sadik Huseny, am the ECF user whose user ID and password authorized the filing of this
14 document. Under Civil L.R. 5-1(i)(3), I attest that all signatories to this document have concurred
15 in this filing.

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